Montana Law Review

Volume 47
Issue 1 *Winter 1986*

Article 2

January 1986

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INTERSPOUSAL TORT IMMUNITY IN MONTANA

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Interspousal tort immunity has a lengthy, rich, and interesting history.[1] But since 1970, courts and legislatures have been increasingly willing to abolish immunity, transforming it into a minority rule which appears destined for widespread elimination by the year 2000. Montana's recent experience is typical. In 1979, the Legislature abolished the rule for intentional torts. However, the Montana Supreme Court has retained the doctrine in the negligence context. The court has recently agreed to reconsider negligence immunity and, should it refuse to change the rule, the Legislature may well address the issue. Thus, it is now appropriate to analyze whether Montana should eliminate interspousal tort immunity in negligence actions.

This essay first surveys immunity's history. Because the question of tort immunity has essentially become a debate over the public policy reasons for the doctrine's abolition or continued application, the paper then examines those rationales. This assessment yields the conclusions that the arguments for elimination are more persuasive than those favoring retention and that continued application of the rule serves virtually no useful purpose. Therefore, abolition of negligence immunity is warranted. Finally, the essay explores significant implications of abolition.

I. THE HISTORY OF INTERSPOUSAL TORT IMMUNITY

A. *United States*

The origins and early development of the concept of interspousal tort immunity warrant only cursory examination.[2] At common law, upon marriage, a woman's legal status was considered

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1. The classic treatment was McCurdy, *Torts Between Persons in Domestic Relation*, 43 HARV. L. REV. 1030 (1930). *Cf.* Comment, *Toward Abolition of Interspousal Tort Immunity*, 36 MONT. L. REV. 251 (1975) (earlier Montana work); Annot., 92 A.L.R.3D 901 (1979) (compilation of cases).

2. For helpful treatment, see McCurdy, *supra* note 1. *See generally* W. PROSSER AND P. KEETON, HANDBOOK ON THE LAW OF TORTS § 122 (5th ed. 1984).

merged into her husband's.[3] Merged legal identity had telling implications for possible tort claims between wedded individuals: neither could acquire a substantive cause of action for personal injuries inflicted by the other, but even if one could there would have been the procedural complications of the husband being both defendant and plaintiff as well as being entitled to any damages awarded.[4] Thus, at early common law, the combination of the indicia of marriage, "some substantive, some procedural, some conceptual," prevented each spouse from ever being "civilly liable as a tortfeasor . . . to the other for any act, antenuptial or during marriage, causing personal injury which would have been a tort but for the marriage."[5]

Wives in colonial America at the time of early settlement enjoyed somewhat greater freedom than their English counterparts.[6] By the end of the seventeenth and throughout the eighteenth century, however, wedded females in the colonies and the mother country had comparable legal status, as English concepts of marital property and the wife's subservience became prevalent.[7] Moreover, the American Revolution only minimally altered wedded women's circumstances,[8] and as late as the mid-nineteenth century wives' legal status was marginally better than that of a much earlier time.[9] But, beginning about 1840, the coalescence of numerous considerations prompted passage of married women's property

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3. The classic articulation appears in William Blackstone's eighteenth century Commentaries on the Law of England: "By marriage, the husband and wife are one person in law; that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of her husband, under whose wing, protection, and cover, she performs everything."

4. As to substance, see Austin v. Austin, 136 Miss. 61, 69, 100 So. 591, 592 (1924); Schultz v. Christopher, 65 Wash. 496, 118 P. 629 (1911). As to procedure, see Abbott v. Abbott, 67 Me. 304, 308 (1877); McCurdy, *supra* note 1, at 1033-35. For complete listings of the disabilities imposed by merger, see *id.* at 1031-35; W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 122, at 859-60 (4th ed. 1971) (and cases cited therein).

5. McCurdy, *Personal Injury Torts Between Spouses*, 4 VILL. L. REV. 303, 307 (1959). *Accord* 1 F. HARPER & F. JAMES, THE LAW OF TORTS § 8.10, at 643 (1956). *Cf.* Haglund, *Tort Actions Between Husband and Wife*, 27 GEO. L.J. 697, 704 (1939) (interspousal tort actions unknown at common law); Phillips v. Barnett, 1 Q.B.D. 436 (1876) (English development).

6. *See* R. MORRIS, STUDIES IN THE HISTORY OF AMERICAN LAW (1930); Chused, *Married Women's Property Law: 1800-1850*, 71 GEO. L.J. 1359, 1384-91 (1983).

7. *See id.* at 1389-91; Salmon, *The Legal Status of Women in Early America: A Reappraisal*, 1 LAW & HIST. REV. 129 (1983).

8. *See* L. KERBER, WOMEN OF THE REPUBLIC: INTELLECT AND IDEOLOGY IN REVOLUTIONARY AMERICA (1980); M. NORTON, LIBERTY'S DAUGHTERS: THE REVOLUTIONARY EXPERIENCE OF AMERICAN WOMEN, 1750-1800 (1980).

9. *See* J. KENT, COMMENTARIES ON AMERICAN LAW (1826); E. MANSFIELD, THE LEGAL RIGHTS, LIABILITIES AND DUTIES OF WOMEN (1845); T. REEVE, THE LAW OF BARON AND FEMME (1846 ed.); Walker, *The Legal Condition of Women*, in THE GOLDEN AGE OF AMERICAN LAW 316-18 (C. Haar ed. 1965).

acts.[10] By the 1870's, nearly every state had enacted such statutes which generally expanded females' rights to hold property.[11] This had important consequences for interspousal tort immunity.

Most significantly, the legislation afforded a handle for abolishing immunity and permitting personal injury actions between husbands and wives. Measures empowering wedded females to sue anyone for damages on their own behalf made it possible to argue that (1) merger had been eliminated, (2) incapacities had been lifted or (3) incidents of legal personality had been prescribed and, thus, that interspousal tort litigation should be allowed. These contentions were precisely the ones asserted by lawyers who pursued the initial cases in the 1860's. The statutes were integral to resolution of most interspousal tort suits during the ensuing 80 years.

Each state legislature enacted married women's property acts granting females indicia of legal status in numerous waves at different times continuing into the twentieth century.[12] The measures were passed for many reasons and at the instigation of changing coalitions. The statutory terminology was dissimilar, but none explicitly prescribed tort litigation between wedded people. Moreover, little legislative history attended passage of the acts. Nonetheless, over time, every jurisdiction modified particular indicia of wives' legal personhood, slowly eroded merger, and gradually bestowed legal identity. Thus, while enactment of the measures cannot be characterized as a radical reform, by the end of the amendment process, it effected changes in interspousal legal relations. These alterations had telling implications for tort immunity. In short, the married women's statutes afforded an "entering wedge" for attorneys who litigated the first cases, initiating a process which is ongoing.

The immunity opinions can be categorized into four distinct time frames. From 1863 until 1913, no state allowed tort claims.[13]

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10. The exact date is 1835. *See* Chused, *supra* note 6, at 1398-99.

11. For helpful analyses of the statutes, see Chused, *supra* note 6; Johnston, *Sex and Property: The Common Law Tradition, The Law School Curriculum and Developments Toward Equality*, 47 N.Y.U. L. REV. 1033 (1971). *Cf.* Chused, *Late Nineteenth Century Married Women's Property Law: Reception of the Early Married Women's Property Acts by Courts and Legislatures*, 29 AM. J. LEG. HIST. 1 (1985) (implementation of Oregon legislation).

12. In the following discussion of the acts, I rely substantially on Chused, *supra* note 6.

13. *See* Peters v. Peters, 156 Cal. 32, 103 P. 219 (1909); Deeds v. Strode, 6 Idaho 317, 55 P. 656 (1898); Main v. Main, 46 Ill. App. 106 (1891); Henneger v. Lomas, 145 Ind. 287, 44 N.E. 462 (1896); Peters v. Peters, 42 Iowa 182 (1876); *Abbott*, 67 Me. 304; Bandfield v. Bandfield, 117 Mich. 80, 75 N.W. 287 (1898); Strom v. Strom, 98 Minn. 427, 107 N.W. 1047 (1906); Longendyke v. Longendyke, 44 Barb. 366 (N.Y 1863), Freethy v. Freethy, 42 Barb.

In 1910, a one-Justice majority of the United States Supreme Court rejected personal injury suit in the District of Columbia.[14] Between 1914 and 1920, seven jurisdictions recognized tort actions, while a similar number upheld immunity.[15] The doctrine eroded slowly over the succeeding half century and has been dramatically converted to a minority proposition since 1970.

Prior to 1950, judges recognizing or abolishing interspousal tort immunity relied substantially on their statutory interpretations of the married women's acts, although those measures are mentioned infrequently and are never dispositive today.[16] Notwithstanding early dependence on the legislation, courts articulated numerous public policy arguments for immunity's retention or abolition.

Five contentions favoring continued application have been enunciated most often. The notion that immunity's recognition preserves conjugal harmony and that interspousal tort claims would disturb peace was formulated first, has been articulated most frequently, and remains a convincing argument. A second significant explanation for whatever strength the rule retains is the concern that wedded individuals permitted to sue one another would perpetrate fraud on insurance carriers. The idea that judges should defer to legislators is the only additional argument which has vitality. Arguments that the doctrine's elimination would "open the floodgates" of litigation and that injured husbands and wives must seek "alternative relief" in criminal or divorce courts, which were enunciated in older opinions, are never seriously relied upon today.[17] Few affirmative policy contentions for rejecting im-

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641 (N.Y. 1865); Nickerson v. Nickerson, 65 Tex. 281 (1886); *Schultz*, 65 Wash. 496, 118 P. 629. *Cf.* McKelvey v. McKelvey, 111 Tenn. 388, 77 S.W. 664 (1903) (dictum in case recognizing parent-child tort immunity).

14. *See* Thompson v. Thompson, 218 U.S. 611 (1910).

15. The states recognizing interspousal tort litigation were Johnson v. Johnson, 201 Ala. 41, 77 So. 335 (1917); Fitzpatrick v. Owens, 124 Ark. 167, 186 S.W. 832 (1916); Brown v. Brown, 88 Conn. 42, 89 A. 889 (1914); Gilman v. Gilman, 78 N.H. 4, 95 A. 657 (1915); Crowell v. Crowell, 180 N.C. 516, 105 S.E. 206 (1920); Fiedeer v. Fiedeer, 42 Okla. 124, 140 P. 1022 (1914); Prosser v. Prosser, 114 S.C. 45, 102 S.E. 787 (1920). States refusing to do so were Heyman v. Heyman, 19 Ga. 634, 92 S.E. 25 (1917); Dishon's Admr. v. Dishon's Admr., 187 Ky. 497, 219 S.W. 794 (1920); Drake v. Drake, 145 Minn. 388, 177 N.W. 624 (1920); Rogers v. Rogers, 265 Mo. 200, 177 S.W. 382 (1915); Lillienkamp v. Rippetoe, 133 Tenn. 57, 179 S.W. 628 (1915); Keister's Adm'r v. Keister's Ex'rs, 123 Va. 157, 96 S.E. 315 (1918).

16. The court which decided the first Montana case relied substantially on statutory interpretation. *See* Conley v. Conley, 92 Mont. 425, 15 P.2d 922 (1932). *See generally infra* notes 25-27 and accompanying text. The acts are never dispositive today, because courts treat immunity as a public policy question.

17. *See* Merenoff v. Merenoff, 76 N.J. 535, 548-57, 388 A.2d 951, 958-62 (1978); Shearer v. Shearer, 18 Ohio St. 3d 94, 480 N.E.2d 388, 392-95 (1985); Hack v. Hack, 495 Pa. 300, 311-16, 433 A.2d 859, 864-67 (1981). Other antiquated arguments, such as "juridical

munity have been espoused, principally because many judges who repudiated the doctrine relied upon the married women's statutes or rejected the policy concepts articulated for retaining interspousal tort immunity.[18] Nonetheless, two arguments have been enunciated: abolition would allow the goals of tort law, primarily deterrence, punishment, and compensation, to be realized and the individual rights of females to be vindicated.[19]

B. *Montana*

Although it is very difficult to generalize, a Montana wife, by virtue of her "frontier" status, apparently enjoyed somewhat more favorable legal treatment than her sisters in either the East or the Far West. For example, the first Montana Territorial Legislature adopted an early married women's act modeled on the California statute,[20] and in 1889, the first female gained admission to the bar.[21] But subsequent married women's measures only slowly expanded females' rights and were similar to those adopted in other states.[22] Thus, on balance, Montana wives' legal status probably differed in degree, not kind, from that of wedded females in most jurisdictions when the Montana Supreme Court was first asked to recognize interspousal tort litigation.[23]

Case law development of interspousal tort immunity has been relatively recent and constricted. The initial suit was filed in 1932. Since then there have been only three and the reasoning employed in the opinions is narrowly confined.[24] The first, *Conley v. Con-*

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equality," appear in early cases. *See, e.g., Conley*, 92 Mont. at 439, 15 P.2d at 926. *Cf.* Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497, 1505, 1511-13 (1983) (discussion of juridical equality concept). *See generally infra* section II(A) of this article.

18. *See, e.g., Gilman*, 78 N.H. 4, 95 A. 657; *Prosser*, 114 S.C. 45, 102 S.E. 787.

19. *See generally infra* section II(B) of this article.

20. *See* Mont. Laws 369 (1864). The modern act appears principally in MONT. CODE ANN. tit. 40, ch. 2 (1985).

21. *See* 9 Mont. vi (1890) and compare with Bradwell v. Illinois, 83 U.S. (16 Wall.) 130 (1873) and In Re Lockwood, 154 U.S. 116 (1894). *Cf.* MONT. CONST. art. IX, § 10 (1889) (women eligible to hold any school district office and vote in school district elections).

22. These are traced in *Conley*, 92 Mont. at 432-34, 15 P.2d at 923-24.

23. Much more research must be undertaken before definitive conclusions can be drawn. *Cf.* Telephone interview with Paula Petrik, Professor of History, Montana State University (certain aspects of Montana law regarding wives' legal status and divorce more progressive, and others, less progressive, than nationally). *See generally* G. BAKKEN, THE DEVELOPMENT OF LAW ON THE ROCKY MOUNTAIN FRONTIER: CIVIL LAW AND SOCIETY, 1850-1912 (1983); Chused, *supra* notes 6, 11. It is interesting that, but unclear precisely why, no case was filed until 1932 by which time the married women's legislation had been substantially amended.

24. All four cases have involved wives injured by husbands' negligent driving. There also are the closely related cases discussed *infra* notes 29-30 and accompanying text and

ley,[25] was premised principally on merged legal identity, the common law rule against interspousal tort claims which could only be modified by the married women's act, and the finding that Montana's measure was not intended to alter the doctrine. But the court also tangentially based the decision on connubial harmony and judicial deference.[26] Opinions rendered in 1933 and 1968 merely cited the precedential ruling in *Conley* and relied on legislative inaction respecting the immunity issue.[27] However, even as recently as 1975 the Montana Supreme Court found that the married women's statute did not prescribe interspousal tort actions and declared that immunity was a "question of public policy best left to the legislative branch of government which is the proper body to determine and set forth public policy."[28]

Nevertheless, subsequent developments in areas that pertain to negligence immunity may be more telling. In two 1983 cases, the court "rejected the defense of interspousal tort immunity for property damage claims," relying partly on the Second Restatement of Torts which had "repudiated the defense,"[29] and refused to recognize the closely analogous intrafamily tort immunity governing parents and children.[30] During 1979, the Montana Legislature eliminated interspousal immunity for intentional torts in the context of passing legislation aimed primarily at the problem of spouse abuse.[31] However, immunity from suit in negligence re-

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legislative abrogation of intentional tort immunity discussed *infra* note 31 and accompanying text. *See generally* Dutton v. Hightower & Lubrecht Constr. Co., 214 F. Supp. 298 (D. Mont. 1963).

25. 92 Mont. 425, 15 P.2d 922.

26. *See id.* at 926. The Montana court also mentioned juridical equality, while rejecting constitutional arguments. *See id. See generally supra* note 17; *infra* notes 65, 75.

27. *See* Kelly v. Williams, 94 Mont. 19, 21 P.2d 58 (1933); State *ex rel.* Angvall v. District Court, 151 Mont. 483, 484-86, 444 P.2d 370, 370-71 (1968). Indeed, both opinions consider legislative inaction important to, if not dispositive of, the immunity issue.

28. State Farm Mutual Auto. Ins. Co. v. Leary, 168 Mont. 482, 485-87, 544 P.2d 444, 446-47 (1975).

29. Norick v. Dove Constr. ___ Mont. ___, 662 P.2d 1318, 1320-21 (1983).

30. *See* Transamerica Ins. Co. v. Royle, ___ Mont. ___, 656 P.2d 820 (1983).

31. *See* MONT. CODE ANN. § 40-2-109 (1985). The legislation was entitled "an act generally revising the law relating to assaults and intentional torts between spouses" and provided for injunctions to prevent disruption of the home by family members. *See* S.B. 409 (1979). Negligence immunity is not mentioned in the "legislative history" of S.B. 409 compiled by the Office of the Montana Legislative Council at the Montana Law Review's request (on file with the Montana Law Review). Carol Mitchell, a member of the State Task Force on Spouse Abuse, who testified in favor of the legislation and Senator Fred Van Valkenburg, who was a member of the Judiciary Committee which considered it, did not remember the issue of negligence immunity being raised. Telephone interviews with Carol Mitchell, Fred Van Valkenburg (Dec. 5, 1985). Senator Thomas Towe, who also was a member of the Judiciary Committee, agreed but indicated that the Legislature would never have voted to abolish negligence immunity had the issue been raised. *See* telephone interview

mains intact, although the Montana Supreme Court has decided to re-examine that issue in 1986.

II. Public Policy Reasons

A. *Reasons for Retention of Immunity*

There are five traditionally espoused public policy rationales for interspousal tort immunity's recognition and retention. Modern judges rarely rely on the propositions that abolition would open the floodgates or that wedded people must pursue alternative remedies afforded by divorce or criminal law.[32] The Montana Supreme Court has never depended on the two ideas in the interspousal tort immunity context. A third argument, that abrogation would disrupt family harmony, has limited applicability to negligently inflicted injury, primarily because insurance invariably covers such harm. Thus, insurance minimizes the possibility of discord, as the Montana Supreme Court recognized in its parent-child immunity determination.[33] But, as the court also acknowledged, this leads to one of the remaining viable policy contentions favoring retention of interspousal tort immunity—fear that spouses would engage in fraud and collusion. The other is that legislatures should resolve the immunity issue.

1. *Fraud and Collusion*

The Montana Supreme Court, unlike courts in other jurisdictions, has never voiced concern that dishonest husbands and wives would defraud their carriers. The Montana court did find, however, that the "possibility of fraud and collusion [was] probably the most persuasive argument against abrogation of parent-child immunity," observing that "unscrupulous families may attempt to recover unjustified awards from insurance companies."[34] Judges have offered numerous explanations why there is great potential for fraudulent conduct between wedded persons. Most importantly, insurance means that spouses may profit from their negligence. Thus, both litigants will benefit from a plaintiff's verdict but be disadvantaged by a defendant's judgment, and there may

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with Thomas Towe (Dec. 5, 1985).

32. *See supra* note 17 and accompanying text.

33. "The existence of liability insurance prevents family discord and depletion of family assets in automobile negligence cases." *Royle*, ___ Mont. at ___, 656 P.2d at 823. Indeed, immunity "could actually disrupt marital harmony by imposing substantial financial burdens for which compensation cannot be recovered." *Infra* text accompanying note 56. *See generally infra* note 55 and accompanying text.

34. *Royle*, ___ Mont. at ___, 656 P.2d at 823-24.

be irresistible incentives, for example, to overstate the seriousness of the actor's negligence or of the harm perpetrated.[35] Moreover, fraudulent interspousal behavior has substantial likelihood of success.[36] Furthermore, litigation of potentially collusive claims can be quite expensive for carriers and for the tort law system.[37]

The Montana Supreme Court and many others, while acknowledging the possibility of unscrupulous conduct, have offered numerous responses to these concerns. Most significant is the unfairness inherent in systematically excluding an entire class of tortiously harmed people, many of whom have legitimate complaints, because certain of its members may behave dishonestly.[38] Judges prefer to depend upon the protections of the tort law process to distinguish collusive actions from valid suits. These safeguards include numerous pretrial discovery mechanisms and many techniques and participants in trials. For example, there is cross-examination, while trial judges and jurors have been quite capable of detecting inappropriate conduct.[39] Should these time-honored mechanisms prove insufficient, more stringent devices, such as elevated burdens of proof, could be applied.[40] A few courts have said that carriers can be protected by refusing to cover husbands and wives.[41] But some judges in interspousal tort cases, and the Mon-

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35. *See* Klein v. Klein, 58 Cal.2d 692, 697, 376 P.2d 70, 75, 26 Cal. Rptr. 102, 107, (1962) (Schauer, J., dissenting); Beaudette v. Frana, 285 Minn. 366, 372, 173 N.W.2d 416, 419 (1969); Smith v. Smith, 205 Or. 286, 311, 287 P.2d 572, 583 (1955).

36. *See* Leach v. Leach, 227 Ark. 599, 604, 300 S.W.2d 15, 18 (1957) (Harris, C.J., dissenting); Raisen v. Raisen, 379 So. 2d 352, 355 (Fla. 1979), *cert. denied*, 449 U.S. 886 (1980); Rubalcava v. Gisseman, 14 Utah 2d 344, 348, 384 P.2d 389, 391 (1963); Ashdown, *Intrafamily Immunity, Pure Compensation, and the Family Exclusion Clause*, 60 IOWA L. REV. 239, 250, 252 (1974).

37. For the tort law system, there may be costs in terms of credibility and public trust. *See* Fernandez v. Romo, 132 Ariz. 447, 451, 646 P.2d 878, 882 (1982); *Leach*, 227 Ark. at 604, 300 S.W.2d at 19 (Harris, C.J., dissenting).

38. *See Royle*, ___ Mont. at ___, 656 P.2d at 824. *Accord* Boblitz v. Boblitz, 296 Md. 242, 267-68, 462 A.2d 506, 518 (1983); Digby v. Digby, 120 R.I. 299, 304, 388 A.2d 1, 4 (1978); Freehe v. Freehe, 81 Wash. 2d 183, 189, 500 P.2d 771, 775 (1972).

39. *See* Brooks v. Robinson, 259 Ind. 16, 21-22, 284 N.E.2d 794, 797 (1972); Shook v. Crabb, 281 N.W.2d 616, 620 (Iowa 1979); Rupert v. Stienne, 90 Nev. 397, 401, 528 P.2d 1013, 1015 (1974).

40. *See Beaudette*, 285 Minn. at 372, 173 N.W.2d at 420; *Merenoff*, 76 N.J. at 554-55, 388 A.2d at 961. Legislative repeal of Montana's guest statute also may reflect policy judgments regarding numerous issues relevant to the fraud and collusion question. For example, it may indicate legislators' belief that (1) an entire class should not be systematically required to meet an elevated burden of proof, (2) the opportunity to pursue compensation outweighs the dangers of fraud, or (3) collusion could be detected with available mechanisms.

41. *See, e.g., Shook*, 281 N.W.2d at 620; Bonkowsky v. Bonkowsky, 69 Ohio St. 2d 152, 158-59, 431 N.E.2d 998, 1002 n.5 (1982) (W. Brown, J., dissenting); *Hack*, 495 Pa. at 315, 433 A.2d at 866.

tana court in the parent-children context, have correctly concluded that exclusionary clauses would defeat abolition's purpose and, thus, invalidated them.[42]

2. *Judicial Deference*

The policy issue which has most concerned the Montana Supreme Court, and judges in numerous other states, is that courts should defer to legislatures on questions of public policy.[43] A number of courts have based deference on the notion of legal certainty[44] or the relative capabilities of judges and legislators to treat the issues immunity raises.[45] Other courts rely upon the comparative authority of the respective governmental branches.[46] While the Montana immunity cases are cryptic, this last factor appears most

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42. *See, e.g.*, Allstate Ins. Co. v. DeFrain, 81 Mich. App. 503, 265 N.W.2d 392 (1978); *Royle*, ___ Mont. at ___, 656 P.2d at 824. Accord as to parent-child immunity, Stevens v. State Farm Mutual Auto. Ins. Co., 21 Ariz. App. 392, 519 P.2d 1157 (1974). *Cf.* MINN. STAT. ANN. § 65B.23 (1974 Supp.); WIS. STAT. ANN. § 623.32(b) (1980) (statutory proscriptions on family exclusion clauses). Accord as to no-fault, N.J. STAT. ANN. § 39:6A-4 (1972); OR. REV. STAT. § 743.800 (1974).

43. For excellent treatment of most of the issues considered in this section, see R. KEETON, VENTURING TO DO JUSTICE (1969). An important way that the deference idea was cast before 1950 was as a response to the question whether the married women's acts provided for interspousal tort litigation. Thus, opinions decided then nearly always proclaimed that far-reaching changes in the common law, like immunity's abolition, must be effected by legislatures in clear terms not by courts in giving unwarranted statutory construction to the acts. *See, e.g., Conley*, 92 Mont. at 440, 15 P.2d at 926; Oken v. Oken, 44 R.I. 291, 293, 117 A. 357, 358 (1922); McKinney v. McKinney, 59 Wyo. 204, 219, 135 P.2d 940, 944-45, 950 (1943). *See generally supra* notes 26-28 and accompanying text.

44. *See, e.g.*, Robeson v. International Indem. Co., 248 Ga. 306, 309, 282 S.E.2d 896, 899 (1981); Guffy v. Guffy, 230 Kan. 89, 96-97, 631 P.2d 646, 651 (1981); *Rubalcava*, 14 Utah 2d at 352, 384 P.2d at 393. One response to this is that tort immunity's abolition creates no more uncertainty than alteration of many other tort doctrines that arose at common law. Examples are the remaining immunities—parent-child, governmental, charitable—contributory negligence, and assumption of risk, all of which have been modified by courts in numerous jurisdictions. *See* PROSSER AND KEETON, *supra* note 2, at §§ 122, 131, and 65-68.

45. Legislatures are said to be more competent to investigate and study abolition, see *Robeson*, 248 Ga. at 309-10, 282 S.E.2d at 899; *Boblitz*, 296 Md. at 282-83, 462 A.2d at 524-25 (Couch, J., dissenting); free of the limitations litigants before the court impose, see Alfree v. Alfree, 410 A.2d 161, 163 (Del. 1979), *appeal dismissed*, 446 U.S. 931 (1980); and better able to fully treat abrogation, see *Klein*, 58 Cal. 2d at 696-97, 376 P.2d at 74-75, 26 Cal. Rptr. at 106-07 (Schauer, J., dissenting); Brawner v. Brawner, 327 S.W.2d 808, 813 (Mo. 1959), *cert. denied*, 361 U.S. 964 (1960).

46. *See, e.g., Klein*, 58 Cal. 2d at 696-97, 376 P.2d at 74, 26 Cal. Rptr. at 106 (Schauer, J., dissenting); Stoker v. Stoker, 616 P.2d 590, 594 (Utah 1980) (Crockett, C.J., dissenting). Courts also have considered abrogation so radical, or so affected with a public interest in wedlock, that it should be left to legislators. *See, e.g.*, cases cited *supra* note 43; Peters v. Peters, 63 Hawaii 653, 659, 634 P.2d 586, 590 (1981); *Guffy*, 230 Kan. at 96, 631 P.2d at 650-51. But abolition is no more radical or more affected with a public interest in marriage than other legal changes. *See generally supra* note 44, *infra* note 61.

significant for the court. It cogently remarked just ten years ago: "We do not believe [interspousal tort immunity] is an area requiring judicial modification of the common law to prevent great injustice. This is a question of public policy best left to the legislative branch of government which is the proper body to determine and set forth public policy."[47]

However, courts in an overwhelming number of states have not deferred in the interspousal immunity context.[48] Similarly, the Montana court has not deferred when changing many longstanding doctrines of tort jurisprudence. Most important to the issue of relative authority possessed by the governmental branches are many judges' determinations that immunity was not statutory, but (1) was judicially created and maintained, or (2) arose at common law and, thus, was peculiarly appropriate for alteration by courts on the basis of public policy.[49] The Montana court has freely modified numerous other tort law doctrines which originated at common law, especially where justice warranted alteration. For example, the justices recognized strict products liability even while acknowledging that it was a "major change in Montana's tort law by way of judicial decision," because "one of the great virtues of the common law is its dynamic nature that makes it adaptable to the requirements of society at the time of its application in court."[50] Most relevant to interspousal tort immunity, however, was the court's recent refusal to defer to the Legislature when resolving the parent-child immunity question. The court's task was "made easier than other states," because this was a "case of first impression" unencumbered by precedent and there was little legislation in the field.[51] But, the court still (1) determined "which rule best serves the needs of justice in this state," (2) characterized parent-child

47. *Leary*, 168 Mont. at 486, 544 P.2d at 447.

48. For comprehensive lists of courts that have not deferred, see *Digby*, 120 R.I. at 302, 388 A.2d at 2; Annot., 92 A.L.R.3D 901 (1979).

49. *See, e.g., Fernandez*, 132 Ariz. at 449, 646 P.2d at 880; *Brooks*, 259 Ind. at 23, 284 N.E.2d at 797; Ebert v. Ebert, 232 Kan. 502, 503, 656 P.2d 766, 767 (1983); *Shearer*, 18 Ohio St. 3d at ____, 480 N.E.2d at 394; Davis v. Davis, 657 S.W.2d 753, 758 (Tenn. 1983). The election of judges in certain jurisdictions, including Montana, see, e.g., MONT. CODE ANN. § 3-2-101 (1985); N.Y. CONST. art. 6, § 2; weakens the authority argument in the sense that judges too are the "elected representatives" of the people.

50. *See* Brandenburger v. Toyota Motor Sales, U.S.A., Inc., 162 Mont. 506, 515, 513 P.2d 268, 273-74 (1973) (citing State v. Culver, 23 N.J. 495, 505, 129 A.2d 715, 721, *cert. denied*, 354 U.S. 925 (1957)). For recent examples of the court's increasing willingness to freely modify common law tort doctrines, see Versland v. Caron Transport, ____ Mont. ____, 671 P.2d 583 (1983); cases developing tort of bad faith, reviewed in Hopkins and Robinson, *Employment At-Will, Wrongful Discharge, and the Covenant of Good Faith and Fair Dealing in Montana, Past, Present, and Future*, 46 MONT. L. REV. 1, 6-14 (1985).

51. *See Royle*, ____ Mont. at ____, 656 P.2d at 824.

immunity as a "man-made rule," and (3) described the judiciary's duty in "examining it to make such rule as justice requires when the legislature has not chosen to act," by according children the "same right or protection and the same legal redress for wrongs done them as others."[52]

These considerations apply with substantial force to interspousal tort immunity, although there are certain dissimilarities in the two intrafamily immunities.[53] Interspousal immunity is no less "man-made" than parent-child immunity. Spouses, especially wives, are no less entitled to rights, protection and redress than children. Interspousal immunity perpetrates additional injustices. It disproportionately affects women, as the four Montana cases illustrate, because husbands invariably drive the family car and cause a significant percentage of household accidents.[54] Immunity's retention also disappoints the reasonable expectations of responsible vehicle owners who purchase insurance in part to protect family members against negligently inflicted injury.[55] Moreover, immunity's continued application could actually disrupt marital harmony by imposing substantial financial burdens for which compensation cannot be recovered.[56]

Specific activity of the Montana Legislature in the interspousal immunity area does not seem particularly significant. Legislative silence or inaction has never been considered very important by the judiciary.[57] Where a legislature has chosen to address

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52. *Id.*

53. Parent-child immunity originated more recently, but so did its abolition, and children may have been even more constrained than wives at common law. *Cf.* sources cited in *id.* at 823; Hollister, *Parent-Child Immunity: A Doctrine in Search of Justification*, 50 FORDHAM L. REV. 489 (1982) (histories of parent-child immunity and children's rights). It also is arguable that the married women's acts constitute legislative activity in the area of interspousal immunity, while little comparable legislation exists as to children. *But cf.* MONT. CONST. art. II, § 15 (1972) (rights of persons not adults). For additional comparison of the intrafamily immunities, see Ashdown, *supra* note 36.

54. Approximately 90% of the plaintiffs in cases challenging immunity from suit for negligent driving have been wives. *Cf.* Annot., 92 A.L.R.3D 901 (1979) (compilation of cases); the four Montana cases (wives were plaintiffs). As to household accidents, the most recent area for abolition of negligence immunity, see *Merenoff*, 76 N.J. 353, 388 A.2d 951; RESTATEMENT (SECOND) OF TORTS § 895 F (1979).

55. *See* Immer v. Risko, 56 N.J. 482, 495, 267 A.2d 481, 485 (1970). Indeed, some courts mention the irony inherent in the insured being unable to protect the "persons nearest to him whom he would most like to see compensated for their injuries." *Shearer*, 18 Ohio St. 3d at ___, 480 N.E.2d at 395. *Accord Beaudette*, 285 Minn. at 371, 173 N.W.2d at 419.

56. *See Immer*, 56 N.J. at 495, 267 A.2d at 485; *Shearer*, 18 Ohio St. 3d at ___, 480 N.E.2d at 393. *See generally* Cutright, *Income and Family Events: Marital Stability*, 33 J. MAR. & FAM. 291 (1971).

57. *See, e.g.*, Helvering v. Hallock, 309 U.S. 106, 119, 121 (1940); United States v. Southern Underwriters Ass'n, 322 U.S. 533, 560-61 (1944); *N.L.R.B. v. Plasterers Local Union*, 404 U.S. 116, 130-31 (1971).

one aspect of a larger problem or to speak in a closely related area, courts generally have not treated such activity as a rejection of propositions not explicitly provided for or binding on the judiciary.[58] Indeed, when legislative bodies have expressly addressed, or even specifically rejected, a proposition before the court, judges have accorded little significance to that activity, much less considered themselves bound, in areas peculiarly non-statutory and appropriate for case law-common law development.[59]

Furthermore, the judiciary is competent to address the immunity issue and should not defer to the legislature. Abolition of interspousal tort immunity is not complicated and requires little data to be resolved. Courts are actually more qualified than legislators to treat the few significant policy questions raised: judges have greater familiarity with fraudulent and collusive litigation, while cases involving conjugal harmony are a staple of their existence.[60] Indeed, the Montana court quite competently addressed one of the minuscule number of complex issues implicated by intrafamily immunities when it invalidated family exclusion clauses in *Transamerica Insurance Co. v. Royle*.[61] Finally, of course, should the legislature disagree with judicial resolution of interspousal immunity, that determination can always be altered.

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58. Indeed, abolition of negligence immunity seems marginally relevant to the 1979 legislation the principal focus of which was spouse abuse. *See generally supra* note 31 and accompanying text; *infra* note 59.

59. *See supra* note 49 and accompanying text. One inference which could be drawn from the 1979 legislative activity is that a legislature willing to abolish the interspousal immunity that involves behavior more morally reprehensible, and threatening to marital harmony, like wife battering, would consider appropriate judicial abrogation of the immunity generally lacking any element of moral reprehensibility, such as negligent driving. *See generally infra* note 73 and accompanying text. *But cf.* Towe interview, *supra* note 31 (Legislature would never have abolished negligence immunity). Moreover, the 1979 Legislature may have not abolished negligence immunity because it had limited relevance to a legislative package aimed principally at spousal abuse or for any number of other reasons relating to the legislative process, such as time constraints or priority accorded other propositions. A classic example of judicial reluctance to draw inferences from similar legislative machinations is National Petroleum Refiners Ass'n v. FTC, 482 F.2d 672, 693-97 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 951 (1974).

60. As to being a staple of existence, see Harris v. Harris, 252 Ga. 387, 389, 313 S.E.2d 88, 90 (1984) (Weltner, J., dissenting). *See generally supra* note 33 and accompanying text. Judges also have greater familiarity with frivolous and trivial suits and the redress provided by alternative relief. *See generally supra* notes 17, 32 and accompanying text.

61. *See Royle*, ___ Mont. ___, 656 P.2d 820. *See generally supra* note 42 and accompanying text. The Legislature also could act in fields, like family law, where abolition might have effects that judges cannot treat adequately. *See generally supra* note 46.

B. *Reasons for Abolition of Immunity*

1. *Tort Law Purposes*

Abolition of interspousal negligence immunity would permit realization of numerous tort law goals.[62] Most important is affording wedded people injured by their spouses' unreasonable behavior the opportunity to seek compensation.[63] The Montana Supreme Court seemed to recognize this purpose in the parent-child context when it observed that children should enjoy the "same legal redress for wrongs done them as others enjoy."[64] Moreover, spouses, particularly married females, are equally deserving. Many judges who articulate this policy rely upon state constitutional provisions like Article II, section 16, of the Montana Constitution: "Courts of justice shall be open to every person and speedy remedy afforded for every injury of person, property, or character."[65] The compensation rationale, however, is based principally on the "prevalence of automobile liability insurance," as the Montana Supreme Court explicitly observed in *Royle*.[66]

All of the policy arguments enunciated for immunity's retention are somehow responsive to the compensation notion. For instance, the alternative remedies provided by divorce and criminal law are said to be adequate, while allowing interspousal tort litigation can threaten connubial harmony or "open the floodgates."[67] But the most serious contention is that husbands and wives will engage in fraud and collusion, thereby eroding the integrity of the civil justice system.[68]

2. *Individual Rights*

Courts have not specifically or thoroughly enunciated the con-

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62. For example, abolition would allow every person, notwithstanding marital status, to be held responsible for unreasonable behavior. But abrogation would have minimal deterrent effect and rarely punish. *See generally* PROSSER AND KEETON, *supra* note 2, at §§ 2-4.

63. *See, e.g.*, Lewis v. Lewis, 370 Mass. 619, 626, 351 N.E.2d 526, 532 (1976); *Beaudette*, 285 Minn. at 373, 173 N.W.2d at 419; *Rupert*, 90 Nev. at 402, 528 P.2d at 1016. For a thorough treatment of the compensation rationale, see Ashdown, *supra* note 36. *See generally* James, *Accident Liability Reconsidered: The Impact of Liability Insurance*, 57 YALE L.J. 549 (1948).

64. *Royle*, ___ Mont. at ___, 656 P.2d at 824.

65. MONT. CONST. art. II, § 16 (1972). *See generally infra* note 70. *But see Conley*, 92 Mont. at 439, 15 P.2d at 926. (rejection of argument for abolition premised on provision's predecessor).

66. *Royle*, ___ Mont. at ___, 656 P.2d at 823. *Accord* Surratt's Adm'r v. Thompson, 212 Va. 191, 194, 183 S.E.2d 200, 202 (1971); Coffindaffer v. Coffindaffer, 161 W. Va. 557, 566, 244 S.E.2d 338, 343 (1978); Ashdown, *supra* note 36.

67. *See generally supra* notes 17, 32-33 and accompanying text.

68. *See supra* section II(A)(1) and *infra* section III(A) of this article.

cept of providing females rights.[69] Some judges have premised abolition on constitutional commands similar to the Montana provision mentioned above,[70] while a few have relied upon the idea of equal protection.[71] Numerous modern opinions also include allusions, like that in *Royle*, to rights of family members and disqualification of a whole class of people essentially on the basis of that status.[72] One reason for the cursory treatment accorded this concept is that personal dignity and individual rights are implicated much less by negligent, than intentional, interspousal behavior.[73] Nonetheless, immunity from suit in negligence has disproportionate impact on women, relegating them to "second-class citizenship," and should be abrogated if only to eliminate one vestige of such citizenship.

There has been little direct response to this notion; it has not been articulated often, expressly or comprehensively. Had courts responded, most would have premised their answers on the idea that affording wives rights against their husbands could disrupt conjugal harmony.[74] More specifically, as to equal protection, numerous judges might have agreed with the *Conley* court that interspousal tort immunity provided "absolute equality" in that neither spouse "had a cause of action against the other."[75]

III. Implications of Abolition

The examination above suggests that interspousal negligence immunity ought to be abolished, and it is likely to be substantially undermined, if not destroyed, in the ensuing decade. It is worthwhile, however, to consider abrogation's consequences for tort ju-

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69. For early examples, see *Austin*, 136 Miss. at 70, 100 So. at 593 (Etheridge, J., dissenting); *Crowell*, 180 N.C. at 522, 105 S.E. at 210. For more recent ones, see *Fernandez*, 132 Ariz. at 449-50, 646 P.2d at 880-81; *Freehe*, 81 Wash. 2d at 186-189, 500 P.2d at 773-74. *Cf.* Olsen, *supra* note 17, at 1509-13, 1530-39 (discussion of individual rights idea).

70. *See supra* note 65 and accompanying text. Typical cases are *Brooks*, 259 Ind. at 24, 284 N.E.2d at 798; Imig v. March, 203 Neb. 537, 545, 279 N.W.2d 382, 386 (1979); Richard v. Richard, 131 Vt. 98, 106, 300 A.2d 637, 641 (1973).

71. The most recent is Moran v. Beyer, 734 F.2d 1254 (7th Cir. 1984). *Cf.* Mont. Const. art. II, § 4 (equal protection and sex discrimination provisions); *supra* note 54 and accompanying text (disproportionate impact of immunity on women). *But see infra* note 75 and accompanying text.

72. *See Royle*, ___ Mont. at ___, 656 P.2d at 824. *Accord Hack*, 495 Pa. at 300, 303, 433 A.2d at 860; MacDonald v. MacDonald, 412 A.2d 71, 75 (Me. 1980); *Merenoff*, 76 N.J. at 566-67, 388 A.2d at 962; *supra* note 38 and accompanying text. *Cf.* Olsen, *supra* note 17, at 1530-39 (discussion of family members' rights).

73. *See generally supra* note 59 (comparing negligent driving with wife battering).

74. *See supra* note 33 and accompanying text.

75. *Conley*, 92 Mont. at 436, 15 P.2d at 925 (citing *Austin*, 136 Miss. at 61, 100 So. at 592). *See generally supra* note 17. *But see supra* notes 54, 72 and accompanying text.

risprudence and for society.

A. *Tort Law Implications*

The effect of abolition on the tort law system will be minimal. Yet, numerous husbands and wives will be able to secure compensatory relief and some deterrence may result. There will, of course, be disadvantages. More claims will be pursued, thereby additionally burdening an already overworked state judiciary. Most difficult, however, will be the problem of interspousal fraud and collusion which "cannot be lightly dismissed," so that a "minimum challenge to judicial resourcefulness will be to act promptly and firmly at any appearance of" such behavior.[76] Thus, some complications may impugn the integrity of, and public trust in, the tort law process, although most can be treated.

B. *Societal Implications*

Abolition will have beneficial impacts for women, wedlock, wives, and the family. Abrogation may increase the respect accorded married individuals in numerous ways. Most importantly, it affords wedded females one constituent of the full panoply of rights enjoyed by other members of society. Women are especially likely to benefit because they are disproportionately injured by negligent interspousal behavior[77] and have historically been perceived as weak beings entitled to fewer rights than men.[78] But abolition also has detrimental implications and restrictions. For instance, it does little to democratize family life or to enhance interspousal relationships.[79]

The advantages of negligence immunity's elimination are greater than its disadvantages. Thus, abolition is proper. The Montana Supreme Court should abrogate the rule when it confronts the immunity question in 1986. If the court finds appropriate continued deference or application of the doctrine, the Legislature should eliminate immunity in its next session.

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76. The first quotation appears in Ashdown, *supra* note 36, at 251. The second is in *Beaudette*, 285 Minn. at 372, 173 N.W.2d at 420. *See generally supra* section II(A)(1) of this article.

77. *See supra* note 54 and accompanying text.

78. *See, e.g., Bradwell*, 83 U.S. (16 Wall.) at 141 (Bradley, J., concurring); Muller v. Oregon, 208 U.S. 412 (1908). *See generally* Olsen, *supra* note 17; Powers, *Sex Segregation and the Ambivalent Directions of Sex Discrimination Law*, 1979 WIS. L. REV. 55.

79. *See* Olsen, *supra* note 17, at 1537-38, 1559-60.

IV. Conclusion

Interspousal tort immunity for negligence has enjoyed a short, largely unexamined, tenure in Montana. But its current application cannot be justified and serves principally to bar potentially legitimate claims of husbands and wives on the basis of marital status. Therefore, the court or the Legislature should abolish the rule at its earliest opportunity.